Supreme Court, U.S.
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No. ____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

UNITED STEELWORKERS OF AMERICA,
Petitioner,

v.

LESLIE RAY COX, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit erred in holding, contrary to the rule in the eleven other circuits, that a RICO action under 18 U.S.C. § 1962(c)—which makes it unlawful for "any person" who is "employed by or associated with any enterprise . . . to conduct . . . such enterprise's affairs through a pattern of racketeering activity" —may be brought against the "enterprise" itself.

2. Whether the Eleventh Circuit erred in holding that the RICO "pattern of racketeering" requirement may be satisfied through the allegation that a single bribe transaction with a single objective encompassed a series of separate criminal events—the solicitaton of the bribe, the agreement to the bribe, and the payment of the bribe in monthly installments (pension payments) rather than in a lump sum—a holding contrary to the rule in five other circuits that a single transaction with a single objective cannot be made into a "pattern" by dissecting the transaction into a series of discrete criminal acts.

PARTIES

In addition to the parties listed in the caption, additional plaintiffs in the courts below were R.M. Cox, Larry Driver, Barry Nichols, John Bullard, Robert W. Kennedy, Jr., Lorenzo G. East, Clarence M. Pope, C.R. Altes, Jack E. Merrymon, Terry P. West, R.S. Arnold, M.W. Milstead, J.W. Wade, Manning A.C. Snider, Terry H. Melvin, Thomas E. Hill, Gary D. Swann, Ronald E. Frazier, Anthony J. Crapet, Robert M. Green, Heath L. McMeans, III, Billy Carter, Joe A. Knight, George Boglin, Wardell Clark, Phillip L. Drummond, Don L. Flurry, Dennis R. Fulton, Dennis E. Jones, W.T. Mayberry, James R. Miller, Willie J. Nation, Oscar Lee Perry, Robert Poole, Brack Wells, Willie Young, and Harry S. Turner. The plaintiffs were certified as representatives of a class for damages only. Additional defendants were the Administrator, United States Steel and Carnegie Pension Fund, and USX Corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner United Steelworkers of America, AFL-CIO-CLC, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *Cox, et al. v. Administrator United States Steel & Carnegie Pension Fund, et al.*, 17 F.3d 1386 (Apr. 5, 1994), *as modified,* 30 F.3d 1347 (Aug. 19, 1994).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 17 F.3d 1386, and is reproduced in Appendix A (1a-71a). The order of the Eleventh Circuit modifying the panel decision, denying in all other respects the petition for rehearing, and denying rehearing *en banc* is reported at 30 F.3d 1347, and is reproduced in Appendix E (162a-166a). The

opinion and order of the United States District Court for the Northern District of Alabama granting in part and denying in part summary judgment is unreported and is reproduced in Appendix B (72a-152a). The opinion and order of the District Court granting in part and denying in part reconsideration of the summary judgment order is unreported and is reproduced in Appendix C (153a-160a). The order of the District Court directing entry of final judgment on the claims at issue is unreported and is reproduced in Appendix D (161a).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on April 5, 1994. A timely petition for rehearing was denied on August 19, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following provisions of the Racketeer Influenced and Corrupt Organizations Act of 1970 are involved:

18 U.S.C. § 1961(3) provides:

> "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

18 U.S.C. § 1961(4) provides:

> "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

18 U.S.C. § 1961(5) provides:

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

18 U.S.C. § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(d) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

STATEMENT OF THE CASE

A. Introduction

Respondents Leslie Ray Cox, *et al.*, and the class they represent, are present and former employees of defendant USX Corporation ("USX" or "the Company") at the USX Fairfield (Alabama) Works, in a bargaining unit represented by petitioner United Steelworkers of America, AFL-CIO-CLC ("the Union"). Respondents claim that, in order to gain collective bargaining agreement concessions at the Fairfield Works, the Company bribed two employees of the Union by giving them, and four of their close associates, personal pension benefits in exchange for those concessions. Respondents brought suit in the United States District Court for the Northern District of Alabama against both USX and the Union, asserting, *inter alia*, that the Union had violated the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, by virtue of the alleged actions of the two Union employees in seeking and accepting bribes in the form of pension benefits for themselves and their four associates.[1]

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[1] Respondents also sued the United States Steel & Carnegie Pension Fund ("the Fund"), which is the pension fund from

The Union moved for summary judgment on, *inter alia*, the following grounds: (1) the alleged bribe here is a single transaction that does not constitute a "pattern of racketeering activity" under RICO by reason of taking the form of pension benefits that are paid out on a monthly basis or by reason of the demand for the bribe and the agreement to pay the bribe occurring at different times; and (2) as eleven other circuits have held, the controlling RICO prohibition—which makes it unlawful "for any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity" (18 U.S.C. § 1962(c))—imposes liability only on the "person" or "person[s]" who commit the wrongdoing and not on the "enterprise" that employs them (or with which they are associated). The court below ruled against the Union on both grounds. The Union seeks review by this Court of those two holdings.

B. Statement of Facts

In September of 1983, as a result of a massive depression in the steel industry, the Fairfield Works had been closed, and its approximately 2,600 employees laid off, for more than a year. USX and the Union began negotiations that month with the objective of reaching an agreement under which the Fairfield Works could be reopened. App. 4a.[2] At the inception of those negotiations, the Company representatives advised the Union that unless agreement were reached on substantial labor cost reductions at the Fairfield Works—which prior to the shutdown had been operating at a large monetary loss to the Company—the Company intended to retain only the new Pipe Mill at Fairfield, to source that mill from its other

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which pensions to retired USX employees are paid. Jurisdiction in the distirct court over the RICO claims was invoked pursuant to 18 U.S.C. § 1964.

[2] References to "App." are to the appendix to this petition for certiorari.

plants, and to permanently shut down the remaining portions of the Fairfield Works. App. 76a. Three months later the Company and the Union agreed to the terms of the Fairfield Agreement, which involved substantial Union concessions from the collective bargaining agreement that had been in effect prior to the shutdown. App. 4a.

Two of the Union's employees, Thermon Phillips and E.B. Rich, negotiated the Fairfield Agreement on behalf of the Union. Phillips was the Director and Rich was the Sub-District Director of District 36 of the Union. Both Rich and Phillips were former USX employees who had left the Company to work for the Union, before accruing enough service to qualify for a Company pension. App. 4a.

Shortly after the Fairfield negotiations began, Rich allegedly raised with the Company the question whether retroactive leaves of absence could be granted to him and to Phillips and certain other Union employees, so that the years they had spent working for the Union would be counted as years spent with USX, and so that they would thereby become eligible for USX pensions. App. 4a, 18a.

On December 24, 1983, after the terms of the Fairfield Agreement had been fully agreed upon, and the Agreement was being typed, Rich and Phillips allegedly stated that they would not sign the agreement until USX gave them an answer on whether they would receive pension credits from USX. According to the testimony upon which respondents and the court below relied, Rich and Phillips signed the agreement only after they were told by a Company representative that while the Company would make no commitment to provide the requested pension credits, the representative was under the impression that the request " 'would be considered favorably.' " App. 5a.

Ten months later, the Company ultimately did grant retroactive leaves of absence, and the resulting pension credits, to Rich and Phillips and to the other four Union

employees Rich and Phillips had named. App. 5a. Upon receiving those credits, Rich and Phillips and the other four were immediately eligible to receive regular monthly pension payments, and they did in fact receive such payments.

C. Proceedings Below

The district court granted the Union's motion for summary judgment on the plaintiffs' RICO claims, not on the grounds that are presented here, but on the ground that respondents could not show that they had been injured by the conduct alleged. App. 109a-120a, 141a. The court concluded, based on all the circumstances of the negotiations and the timing of the company's promise to consider the pension request, that " 'the jury could not reasonably infer that USX's promise [to consider the pension request] influenced the negotiators to make concessions in the [Fairfield Agreement].' " App. 18a.

The court of appeals reversed. That court stated that "although there may be no direct evidence that the Union negotiators made concessions to obtain personal pension benefits, there is a great deal of circumstantial evidence that could lead a reasonable jury to that conclusion." App. 19a.

The court of appeals therefore proceeded to consider the Union's two alternative grounds for affirming the summary judgment on the RICO count.

1. The Eleventh Circuit rejected the Union's contention that 18 U.S.C. § 1962(c)—which makes it unlawful "for any person employed by or associated with any enterprise . . . to conduct . . . such enterprise's affairs through a pattern of racketeering activity"—imposes liability only on the "person" or "person[s]" who abuse their position with the enterprise by commiting the specified wrongdoing, and not on the "enterprise" whose affairs were unlawfully conducted by the wrongdoer(s). That court acknowledged that "the law of other circuits" does not allow for such enterprise liability because the

other circuits have adopted "the non-identity rule," under which the "person" who may be held liable under § 1962(c) cannot be the same as the "enterprise" whose affairs are alleged to have been wrongfully conducted. App. 32a.

The court below refused to apply the rule followed in the other circuits, because, in a prior decision, the Eleventh Circuit had "squarely rejected the non-identity rule." App. 32a-33a (citing *United States v. Hartley*, 678 F.2d 961, 989 n.43 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983)). The decision below states: "We, of course, have squarely rejected the non-identity rule, observing that liability for the acts of one's agents 'is simply a reality to be faced by corporate entities.' " App. 32a-33a (quoting *United States v. Hartley*, 678 F.2d at 989 n.43). And the court of appeals added that as a result of its rejection of the non-identity rule, "[t]he narrow exception to vicarious liability recognized by some circuits in order to preserve the non-identity rule is, therefore, inapplicable." *Id.* Accordingly, respondents' RICO claims against the Union were reinstated, including those claims expressly alleging the Union to be the § 1962(c) "enterprise" whose affairs were conducted through a pattern of racketeering activity.

2. The Eleventh Circuit also rejected the contention that the single bribe transaction alleged in this case does not constitute a "pattern of racketeering activity" as is required for liability under RICO. That court held that because the alleged bribe took the form of a pension which was paid in monthly installments over a period of years, and because the alleged racketeering activity included the "ma[king of] the alleged request" and the granting thereof as well as the subsequent payments, the alleged bribe transaction could be viewed as consisting of a series of criminal acts which collectively could be denominated a "pattern." App. 13a-14a.

The Union filed a timely petition for rehearing and rehearing *en banc* on both issues just described—pointing

out with respect to both issues that the position of the Eleventh Circuit is at odds with the position of other circuits. The petition was denied. App. 162a-166a.

REASONS FOR GRANTING THE WRIT

This case presents two central RICO questions, both of which have generated square conflicts among the circuits.

Section 1962(c) of RICO makes it unlawful for the employees of an "enterprise" to conduct the affairs of that "enterprise" through a pattern of racketeering activity. Every circuit other than the Eleventh Circuit has held that this provision—as its literal language makes clear—is directed at the wrongdoing employees and *not* at the enterprise that the wrongdoing employees misuse. In this case, the Eleventh Circuit, being presented with that otherwise uniform conclusion, rejected the views of every other circuit in holding that the Union can be held liable under 1962(c) for its employees' alleged acceptance of a bribe in exchange for the employees' failure properly to carry out their job responsibilities.

Section 1962(c) also requires proof of a "pattern of racketeering activity." The purpose of the pattern requirement is to limit RICO's application to crimes that "themselves amount to, or that . . . otherwise constitute a threat of, *continuing* racketeering activity." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240 (1989) (emphasis in original). Since the decision in *H.J. Inc.*, five circuits—the First, Second, Third, Sixth and Seventh Circuits—have held that the pattern requirement cannot be satisfied by breaking up a single transaction with a single objective into its separate component criminal parts. Contrary to the decisions of those circuits, the Eleventh Circuit concluded here that the pattern requirement is met through the allegation of a single bribe transaction with a single objective, because (1) the alleged solicitation of the bribe and the agreement to pay the bribe were separate criminal events occurring at distinct times, and

(2) the bribe was not in the form of a lump sum payment but was in the form of entitlements to pensions, which were paid in regular monthly installments over a period of years.

Violators of RICO § 1962(c) are subject to extraordinary criminal and civil sanctions. Subjecting a legitimate enterprise to these enhanced sanctions because its employee takes personal bribes—or engages in other predicate criminal activity for personal benefit—places those enterprises at heretofore unimagined risk. And, finding that a single, garden variety bribe transaction can be converted into a RICO violation by breaking the transaction into its component parts would make virtually every bribe —and every fraud and other forms of wrongful transactions —a potential RICO violation. That result could only make RICO the cause of action of choice—and the federal courts the fora of choice—for such claims, both criminal and civil. And, we submit, that result is not what Congress intended, what sound law enforcement requires, or what an already overburdened federal judicial system can accommodate.

Given these large stakes, the questions presented here have been heavily litigated. This Court should take this opportunity to resolve the resulting circuit conflicts in the interest of the uniform application of RICO throughout the federal judicial system.

I. THE NON-IDENTITY ISSUE

Subsection (c) of 18 U.S.C. § 1962 provides in pertinent part: "It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct . . . such enterprise's affairs through a pattern of racketeering activity." [3] In this case, in which the Union's al-

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[3] Subsection (c) of 18 U.S.C. § 1962 provides in full that:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate,

leged liability is founded on the bribe-taking of two of the Union's employees, the core RICO claim against the Union alleges that the Union is the "enterprise" whose affairs were wrongfully conducted under subsection (c).[4] Thus, as the court below recognized, App. 27a-33a, this case ultimately turns on the correctness of the so-called "non-identity rule" that a single entity cannot be the § 1962(c) "enterprise" and a § 1962(c) defendant.

Eleven circuits have held that under subsection (c), a claim *cannot* be maintained against the "enterprise"—such as the Union here—that is alleged to have had its affairs "conduct[ed] . . . through" the alleged racketeering activity of "person[s] employed by or associated with" the enterprise.[5] The court below acknowledged that this is the

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directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Subsection (a) of § 1962, which applies where the proceeds of a pattern of racketeering activity are invested in an enterprise, is not a basis for Union liability here, where no proceeds of the alleged racketeering activity were invested in the Union; nor is subsection (b), which applies where control of an enterprise is acquired or maintained through a pattern of racketeering activity. And, although the complaint alleges that the Union—through Rich and Phillips—conspired with the Company to commit a violation of § 1962(c), and thereby violated RICO's conspiracy provision, 18 U.S.C. § 1962(d), "[such a] conspiracy claim suffers from precisely the same infirmity as the section 1962(c) claim, and need not be discussed separately." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 45 n.4 (1st Cir. 1991). *Accord Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1191 (3d Cir. 1993).

[4] See *infra* note 6.

[5] *See, e.g., Yellow Bus Lines, Inc. v. Drivers Local 639*, 883 F.2d 132, 139-41 (D.C. Cir. 1989), *aff'd in pertinent part*, 913 F.2d 948, 950-51 (D.C. Cir. 1990) (en banc), *cert. denied*, 111 S. Ct. 2839 (1991); *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44-45 (1st Cir. 1991); *Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28, 29-34 (1st Cir. 1986); *Bennett v. United States Trust Co. of New York*, 770 F.2d 308, 314-15 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1411-13

prevailing construction of the statute. But the court below rejected that approach because of its earlier decision in *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983), which had "squarely rejected" the non-identity rule. App. 32a-33a.

Hartley was the first decision of any circuit to address the question whether liability under § 1962(c) can extend to the enterprise that is alleged to have been the medium through which "person[s] employed by or associated with" the enterprise have engaged in a pattern of racketeering activity. In the succeeding twelve years, each of the eleven other circuits has considered the issue and has come to the opposite conclusion from that reached in *Hartley*, *see supra* note 5. And that contrary conclusion has been reached after full and thoughtful consideration of *Hartley*. *See, e.g., Schofield v. First Commodity Corp.*, 793 F.2d at 30 ("Only one circuit has

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(3d Cir. 1993); *Glessner v. Kenney*, 952 F.2d 702, 710-14 (3d Cir. 1991); *Brittingham v. Mobil Corp.*, 943 F.2d 297, 300-03 (3d Cir. 1991); *Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1356-62 (3d Cir. 1987); *B.F. Hirsch v. Enright Ref. Co.*, 751 F.2d 628, 633-34 (3d Cir. 1984); *New Beckley Mining Corp. v. United Mine Workers of America*, 18 F.3d 1161, 1163-64 (4th Cir. 1994); *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840-41 (4th Cir. 1990) (en banc); *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989); *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122, 122-23 (5th Cir. 1986) (per curiam); *Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481, 1488-89 (6th Cir. 1989); *D & S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964, 966-68 (7th Cir.), *cert. denied*, 486 U.S. 1061 (1988); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1306-07 (7th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989); *Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 399-402 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985); *Luthi v. Tonka Corp.*, 815 F.2d 1229, 1230 (8th Cir. 1987); *Bennett v. Berg*, 685 F.2d 1053, 1061-62 (8th Cir. 1982), *aff'd in pertinent part*, 710 F.2d 1361, 1364 (8th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1008 (1983); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1533-34 (9th Cir. 1992); *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1396-98 (9th Cir. 1986); *Board of County Comm'rs of San Juan County v. Liberty Group*, 965 F.2d 879, 885 & n.4 (10th Cir.), *cert. denied*, 113 S. Ct. 329 (1992).

rejected the separate person/enterprise distinction. [Citing *Hartley*].") (1st Cir.); *Bennett v. United States Trust Co. of New York*, 770 F.2d at 315 (expressly rejecting *Hartley*, "we follow the majority view and hold that under section 1962(c) a corporate entity may not be simultaneously the 'enterprise' and the 'person' who conducts the affairs of the enterprise through a pattern of racketeering activity") (2d Cir.); *B.F. Hirsch v. Enright Refining Co.*, 751 F.2d at 633-34 ("Thus, the rationale of the *Hartley* case is significantly undercut. * * * [W]e believe that the majority view best comports with Congressional intent. One of the Congressional purposes in enacting RICO was to prevent the takeover of legitimate businesses by criminals and corrupt organizations. . . . It is in keeping with that Congressional scheme to orient section 1962(c) toward punishing the infiltrating criminals rather than the legitimate corporation which might be the innocent victim of the racketeering activity in some circumstances.") (3d Cir.) (citations omitted); *Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d at 1358 ("The contrary rule has been adopted only by the Eleventh Circuit, in *Hartley*.") (3d Cir.); *Bishop v. Corbitt Marine Ways*, 802 F.2d at 123 ("With all deference to our Brethren of the Eleventh Circuit, we align ourselves with the weight of authority: where subsection (c) violations are concerned, the 'person' and the 'enterprise' must be distinct.") (5th Cir.); *Haroco, Inc. v. American Nat'l Bank & Trust of Chicago*, 747 F.2d at 400-02 (analyzing in detail and expressly rejecting the Eleventh Circuit reading of subsection (c) and stating: "As we read subsection (c), the 'enterprise' and the 'person' must be distinct.") (7th Cir.).

The instant case provided the Eleventh Circuit—both the panel that heard the case and the entire court on the petition for rehearing *en banc*—with the opportunity to reconsider *Hartley* in the light of *Hartley's* subsequent rejection by every other circuit. But the opinion below, after canvassing the law of other circuits stated:

> Our review of the law of other circuits . . . reveals that [it is] the non-identity rule . . . [that] protects . . . those employers who are also the RICO enterprises for purposes of § 1962(c). We, of course, have squarely rejected the non-identity rule . . . [citing *Hartley*]. [App. 32a-33a.] [6]

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[6] The court below did state that if the construction of § 1962(c) that has been adopted by the other circuits were applied here, respondents' claims against the Union under that provision would not be completely eliminated, because "[respondents] also allege that the Fairfield Works and the Fund are enterprises as well," and because the construction of § 1962(c) adopted by the other circuits "would not be threatened by holding the Union liable for its agents' corruption of the mill or the Fund." App. 33a.

That assertion does not alter the fact that the court below validated respondents' claims in which the Union *is* the alleged affected "enterprise." As to the Union, those are the central RICO claims in this case. And all of respondents' other RICO claims are deficient in other respects. The Fairfield Works or the Fairfield "mill," App. 33a, is merely one *physical facility* operated by USX, and therefore could not be a RICO "enterprise" at all. *See Elliott, supra* note 5, 867 F.2d at 881. As for the Fund, the act that allegedly harmed the plaintiffs—the concessions in the 1983 Fairfield Works Agreement—was not a predicate act through which the affairs *of the Fund* were conducted; thus, plaintiffs could have suffered no injury caused by the alleged RICO violation involving the Fund as an "enterprise." *Cf. Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 384-89 (8th Cir.), *cert. denied*, 113 S. Ct. 2459 (1993).

Moreover, the Eleventh Circuit's reference to these other "enterprises" overlooks that "[a] RICO complaint is not a mix and match game in which plaintiffs may artfully invoke magic words to avoid dismissal." *Glessner, supra* note 5, 952 F.2d at 714. No matter how many ways respondents may label their claims, the underlying allegations remain the same: USX bribed Rich and Phillips with personal benefits for themselves and four associates in order to induce Rich and Phillips improperly to conduct their Union functions. Accordingly, no matter which entity is named as the "enterprise" under subsection (c), the Union's asserted liability turns on whether the Union may properly be held liable under that provision for the alleged bribe-taking by its employees. The analysis adopted by other circuits would not permit the imposition of liability on the Union in such circumstances, because such liability

And, the petition for rehearing *en banc* was denied without opinion.

A clearer and more intractable circuit conflict could not be imagined. As a leading treatise has observed:

> Almost all of the circuits have now construed section 1962(c) to require that the "person" who engages in the pattern of racketeering activity be an entity distinct from the enterprise, at least where the entity is a corporation. Only the Eleventh Circuit has taken a contrary position. Interestingly, it was the first court to decide the issue; the other circuits have all declined to follow its lead.

D. Smith and T. Reed, *Civil RICO*, ¶ 3.07, at 3-67 (1994) (footnotes omitted).[7]

Unless this Court resolves this conflict, the law in the Eleventh Circuit on this important issue will remain contrary to the law in every other circuit. This conflict should not be allowed to persist. Section 1962(c) liabil-

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would be inconsistent with the purpose of the non-identity rule, which is to protect legitimate enterprises from the racketeering activity of their employees—not to subject such enterprises to the destructive sanctions of RICO. *Schofield, supra* note 5, 793 F.2d at 31; *Yellow Bus, supra* note 5, 883 F.2d at 140; *Liquid Air Corp., supra* note 5, 834 F.2d at 1306; *Enright*, 751 F.2d at 633-34.

[7] Nor is the conflict with the other circuits eliminated by the Eleventh Circuit's holding that liability may be applied only if the enterprise has derived some "benefit" from the wrongdoing of its agent. *See* App. 33a-34a. Even accepting the attenuated reasoning under which the court below posited an indirect benefit to the Union from the pensions received by Rich and Phillips and their four associates, App. 36a-37a, the law of the other circuits is that the enterprise whose affairs have been conducted through an agent's pattern of racketeering activity cannot be held liable under subsection (c) "even though it may benefit from its employees' § 1962(c) violations." *Brittingham, supra* note 5, 943 F.2d at 302. *See also Lorenz, supra* note 5, 1 F.3d at 1412-13; *Yellow Bus Lines, supra* note 5, 883 F.2d at 140; *Haroco, supra* note 5, 747 F.2d at 402; *Schreiber, supra* note 5, 806 F.2d at 1397.

ity generates the strongest forms of sanctions—including forfeitures, treble damages, and increased criminal sanctions. That liability provision and those sanctions were crafted by Congress to strike "a mortal blow," 116 Cong. Rec. 602 (1970) (statement of Senator Hruska), against those who misuse the legitimate enterprises which employ them, or with which they are associated, by engaging in a pattern of racketeering activity. The congressional provision for such extreme sanctions against those who violate § 1962(c) is thus premised on the following considerations: Severe criminal and civil sanctions are powerful means to deter and to punish those who would seek to use or who in fact use legitimate organizations as a base for carrying out a pattern of racketeering activity; criminal or civil RICO actions against such "person[s]" are intended to have a protective effect or a cleansing and restorative effect on the legitimate enterprises that those persons would abuse or have abused. So far as we are aware, there is nothing in § 1962(c), or its history, which bespeaks an intent to authorize the striking of "mortal blow[s]" at the misused enterprise itself. And, only in the Eleventh Circuit is that perverse result permitted.

The first issue presented here thus goes to the essence of § 1962(c) of RICO. Is subsection (c) intended as a means of safeguarding or as a means of punishing legitimate enterprises whose affairs are conducted by an employee or a group of employees through a pattern of racketeering activity? That is an issue as to which this Court should resolve the existing circuit conflict.

II. THE PATTERN ISSUE

RICO does not apply to racketeering activity *simpliciter*. Rather, the statute—and the enhanced criminal penalties and other heightened forms of relief available thereunder, see *supra* at 15—apply only where there is proof of a more aggravated course of wrongdoing than the commission of a predicate crime listed in 18 U.S.C.

§ 1961(1): there must be proof of a "*pattern* of racketeering activity." The term "pattern" thus becomes critical to defining the scope of RICO.

This Court addressed the meaning of that term in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). Stating that the term "pattern" is to be given its "commonsense, everyday understanding," 492 U.S. at 241,[8] the Court held that "to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of *continued* criminal activity." *Id.* at 239 (emphasis by the Court).

Since *H.J. Inc.* was decided, RICO plaintiffs have responded to the decision by claiming that a single criminal transaction can be found to satisfy the "pattern" requirement if the transaction can be dissected into a series of acts each of which is criminal—for example, if a bribe is paid in installments and is preceded by negotiations, or if a mail fraud is accomplished by more than one mailing.

In decisions before and after *H.J. Inc.*, the First, Second, Third, Sixth and Seventh Circuits have rejected such an interpretation of the "pattern" requirement.[9] In this

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[8] *See also* 492 U.S. at 237 (legislative history calls for a "natural and commonsense approach").

[9] With respect to bribery, *see, e.g., Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 30-31 (1st Cir. 1987) ("single instance of bribery" cannot be "distorted" into a pattern of racketeering merely because the bribe "is implemented in several steps and involves a number of acts of communication"); *Clapp v. Greene*, 743 F. Supp. 273, 277, 278 (S.D.N.Y. 1990) (continued payments "will not transform a single alleged bribe into a pattern for RICO purposes"), *aff'd*, 930 F.2d 912 (2d Cir.), *cert. denied*, 112 S. Ct. 197 (1991); *see also* United States Dept. of Justice, *Racketeer Influenced and Corrupt Organizations (RICO); A Manual for Federal Prosecutors* 48 (1985) ("the pattern [allegation] will not be approved if all payments are installments of an agreed-upon overall bribe").

With respect to mail fraud and similar crimes, *see, e.g., Vemco, Inc. v. Camardella*, 23 F.3d 129, 134-35 (6th Cir. 1994) (extensive

case, the Eleventh Circuit adopted the interpretation rejected by those circuits. The decision below holds that the single episode of bribery alleged here can be characterized as a "pattern" because the alleged bribe—a pen-

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fraud and extortion extending over 17 months did not constitute a pattern where those predicate acts were part of a "single criminal episode" with a single goal); *420 East Ohio Ltd. Partnership v. Cocose*, 980 F.2d 1122, 1124-25 (7th Cir. 1992) ("large number" of predicate acts of fraud do not constitute a pattern, because "the number of mailings does not necessarily bear a reliable relationship to the magnitude of [defendant's] racketeering activity"); *Apparel Art Int'l, Inc. v. Jacobson*, 967 F.2d 720, 722-23 (1st Cir. 1992) (series of criminal acts including "a bribe, several false statements, a cover-up, and . . . access to confidential information" did not constitute a pattern because "taken together, they comprise a single effort to obtain (and to keep) one $96 million Defense Department contract"); *Talbot v. Robert Mathews Distrib. Co.*, 961 F.2d 654, 663 (7th Cir. 1992) (conspiracy extending over a period of years involving multiple acts of mail fraud did not constitute a pattern where the acts had a single object and produced a single injury); *Vild v. Visconsi*, 956 F.2d 560, 569 (6th Cir.) (multiple acts of fraud " 'amount at best to a breach of contract with a single customer' "), *cert. denied*, 113 S. Ct. 99 (1992); *Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 46-47 (1st Cir. 1991) (series of fraudulent billing notices over four years did not create a pattern); *J.D. Marshall Int'l, Inc. v. Redstart, Inc.*, 935 F.2d 815, 820-21 (7th Cir. 1991) (numerous instances of fraud over 18 months did not constitute a pattern where all predicate acts were "predicated on a single transaction"); *Kehr Packages, Inc.. v. Fidelcor, Inc.*, 926 F.2d 1406, 1413-19 (3d Cir. 1991) (fact that numerous acts of mail fraud took place over nineteen months and "might have continued for years" does not create a pattern, where those mailings were incidental to a single episode of fraud and "did not contribute any injury additional to that already inflicted"), *cert. denied*, 501 U.S. 1222 (1991); *Marshall-Silver Constr. Co. v. Mendel*, 894 F.2d 593, 595-97 (3d Cir. 1990) (predicate acts including three extortionate threats, the filing of a fraudulent bankruptcy petition and generation of false publicity do not constitute a pattern "[w]here such a fraudulent scheme inflicts or threatens only a single injury"); *United States Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1267-69 (7th Cir. 1990) ("considerable number" of instances of fraud do not create a pattern where they all "relate[] back to the extortion allegedly achieved by [a single] contract," which was "only one dishonest undertaking").

sion—was (like most pensions) paid in monthly installments rather than a lump sum, with each payment representing a distinct criminal act, and because the acts of requesting and agreeing to the pensions constituted separate predicate crimes. App. 13a-14a.

The several circuits that have gone the other way have emphasized that the approach adopted by the Eleventh Circuit reads the "pattern" requirement out of the statute. Those courts have observed that many of the predicate crimes to which RICO applies inherently involve a "pattern" in the sense in which the court below used that term. As the Third Circuit put it in *Marshall-Silver Constr. Co. v. Mendel, supra* note 9, 894 F.2d at 597, "[v]irtually every garden-variety fraud is accomplished through a series of wire or mail fraud acts that are 'related' by purpose and are spread over a period of at least several months. Where such a fraudulent scheme inflicts or threatens only a single injury, we continue to doubt that Congress intended to make . . . availab[le] . . . treble damages and augmented criminal sanctions. . . ." *See also Apparel Act Int'l, Inc. v. Jacobson, supra* note 9, 967 F.2d at 722 ("many individual bank robberies, frauds, drug sales, embezzlements, and other crimes as well would automatically fall within the scope of the RICO statute, a result contrary to RICO's basic purpose").

Thus, on the issue presented here as to the meaning of "pattern," there is a sharp conflict between the Eleventh Circuit on the one hand and the First, Second, Third, Sixth and Seventh Circuits on the other. The issue already has proved to be a frequently recurring one, as the sampling of cases cited *supra* note 9 attests. It is fair to say that no RICO issue has greater practical ramifications. The proper interpretation of the pattern requirement is the critical determinant of whether that statute is a free substitute for the laws setting out the predicate crimes or one confined to a subclass of especially serious and persistent wrongdoing. Certiorari should be granted to resolve the conflict among the circuits on this issue.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for certiorari to review the decision of the Eleventh Circuit in this case.

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